No. 83-442

In the Supreme Court of the United States

OCTOBER TERM, 1983

PAUL HILL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's acquittal of conspiracy to distribute heroin and on one substantive distribution count bars his reprosecution, following his successful appeal on other grounds, on five counts charging other distributions as to which the first jury had convicted him.

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OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. 1A-2A) is not reported. The opinion of the district court denying petitioner's post-trial motions (Pet. App. 3A-35A) is reported at 550 F. Supp. 983. The prior opinion of the court of appeals reversing petitioner's conviction on another ground (Pet. App. 36A-45A) is reported at 655 F.2d 512. The opinion of the district court following petitioner's first trial (Pet. App. 46A-64A) is reported at 481 F. Supp. 558.

JURISDICTION

The judgment of the court of appeals was entered on June 15, 1983. The petition for a writ of certiorari was filed on September 9, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted on five counts of distributing heroin, in violation of 21 U.S.C. (& Supp. V) 841(a)(1), and was acquitted on one count of conspiracy to distribute heroin, in violation of 21 U.S.C. 846, and on one substantive count of distributing heroin. The court of appeals reversed petitioner's convictions on the ground that the district court had erred in excluding expert psychiatric testimony proffered by petitioner in support of his entrapment defense (Pet. App. 36A-45A). Following retrial in 1982, petitioner again was convicted on five counts of distributing heroin. He was sentenced on three of the counts to concurrent ten-year terms of imprisonment, to be followed by concurrent five-year special parole terms, and on the remaining two counts to concurrent five-year terms of probation. The court of appeals affirmed (Pet. App. 1a-2a).

1. The facts underlying petitioner's convictions are as follows: During February 1979, Ian Daniels, a government informant, approached petitioner on a number of occasions concerning the possibility of making a purchase of heroin (Pet. App. 36A). After several requests by Daniels, petitioner agreed to provide a source of heroin. On March 13, 1979, Daniels and undercover agent Jerome Harris visited petitioner at the clothing store where petitioner was employed. During that visit, petitioner gave Daniels a small sample of heroin and told him that it sold for $3,100 per half-ounce and that it was strong enough to "take an eight cut" (that it could be diluted eight times before being sold on the street). C.A. Supp. App. 7a-9a, 101a-102a.[1] Later that day, Daniels

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[1]References to the supplemental appendix filed in the court of appeals are taken from the brief for the government also filed in that court.

made a tape recorded telephone call to petitioner. Daniels told petitioner that the heroin was good and that he wanted to get more. During a second recorded coversation that same day, petitioner told Daniels that the deal was set for a half-ounce of heroin and that Daniels should bring the money with him the following day. *Id.* at 115a, 277a, 280a, 288a.

On March 14, 1979, Daniels and Harris met with petitioner as arranged. Petitioner and Harris discussed the sample petitioner had supplied the previous day. Although petitioner refused Harris's request that he lower the purchase price beneath $3,100 per half-ounce, he suggested that a lower price might be possible for future sales. C.A. Supp. App. 16a, 116a. Having agreed upon the price, the three proceeded to the apartment of petitioner's co-defendant and supplier, Leonard Newton. Newton weighed out the half-ounce of heroin and petitioner accepted and counted the $3,100 from Harris. In response to Harris's inquiry concerning further transactions, Newton instructed Harris to contact him through petitioner. *Id.* at 17a-24a, 118a-120a.

Approximately one week after this initial sale, Harris, accompanied by Miles Edwards, another undercover agent, again visited petitioner at his place of employment. Harris introduced Edwards as his "boss" in the narcotics business and Edwards explained that he would be handling any larger heroin transactions that might take place in the future. In response to questioning by Edwards, petitioner stated that he could supply an ounce of heroin at "anytime." C.A. Supp. App. 28a, 167a. Another sale was consummated on March 29, 1979, when Daniels, Edwards and Harris accompanied petitioner to Newton's apartment. There Newton supplied them with an ounce of heroin. In accordance with petitioner's instructions, Edwards paid $5,850 for the heroin — slightly less than the unit price for the prior half-ounce sale. *Id.* at 32a-34a, 126a, 170a-174a, 179a. The

next sale took place on April 23, 1979. On that date Agents Edwards and Harris accompanied petitioner to a hotel room where they met with Newton. Newton supplied an ounce of heroin, and the officers again paid a price quoted by petitioner —$5,850. Petitioner also gave the officers a price list showing the discounts available for multi-ounce purchases of heroin. *Id.* at 39a-42a, 223a-226a.

During the following month, Edwards and Harris met with petitioner on several occasions in order to arrange the purchase of from six to eight ounces of heroin. Petitioner stated that he would be able to provide quality heroin that could be diluted 15 times. C.A. Supp. App. 51a, 230a-231a. A sale was arranged, and Edwards and Harris again accompanied petitioner to a hotel room where Newton was waiting. After admitting petitioner and the officers into the hotel room, Newton left the room to meet his source in the hotel lobby. Newton telephoned the room and cancelled the deal, however, because his source had noticed surveillance officers in the lobby. *Id.* at 56a, 243a-246a.

Efforts to consummate the sale nevertheless continued. On June 12, 1979, petitioner contacted Edwards and Harris and asked them to come to the clothing store where he worked. Petitioner then supplied them with a sample of heroin that he stated could be diluted ten times and that would sell for $6,500 an ounce. C.A. Supp. App. 64a-75a, 251a-254a. Edwards, Harris and petitioner met again on June 18, 1979, and finalized arrangements for the purchase of eight ounces of heroin at the reduced price of $4,900 for each of the first seven ounces and $5,000 for the eighth ounce. *Id.* at 256a. Later that day, Edwards and Harris met petitioner and Newton at a motel. Newton placed seven or eight ounces of heroin on a table and Edwards showed petitioner approximately $35,000 in cash. Edwards and Harris then placed petitioner and Newton under arrest. *Id.* at 80a, 261a.

2. Petitioner was charged with one count of conspiracy to distribute heroin and six substantive counts of distributing heroin.[2] At his first trial, petitioner was acquitted on the conspiracy charge and on the first distribution charge, which was based on petitioner's having supplied the initial sample to Daniels on March 13, 1979. Petitioner was convicted at both his first and second trials on the five remaining substantive counts — *i.e.*, sale of one-half ounce of heroin on March 14, sale of an ounce of heroin on March 29, sale of an ounce of heroin on April 23, distribution of the heroin sample on June 12, and the attempted sale of eight ounces of heroin on June 18. Petitioner's defense at both trials was entrapment.

ARGUMENT

Although petitioner articulates his position in several different ways, the thrust of his argument is that his acquittal on the conspiracy count and the first (March 13) substantive count precludes his conviction on the remaining five substantive counts. No matter how it is presented, there is no merit to his claim.

1. At the outset petitioner appears to contend (Pet. 10-12) that, as a matter of law, once a defendant is found to have been entrapped as to one aspect of a criminal enterprise,[3] conviction on any subsequent phase of the enterprise is barred. Neither *Sherman* v. *United States*, 356 U.S. 369 (1958), on which petitioner relies heavily, nor any other decision of which we are aware supports petitioner's assertion.

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[2]Newton was charged with the same offenses, but he pleaded guilty to certain of them and did not proceed to trial (Pet. App. 4A).

[3]We do not dispute that petitioner's acquittal on counts one and two was based on a finding that he was entrapped on those counts. The determination of the basis for a jury's verdict is to be made "with realism and rationality." *Ashe* v. *Swenson*, 397 U.S. 436, 444 (1970). Here,

In *Sherman* this Court simply held (356 U.S. at 373-375) that a particular factual pattern established the defense of entrapment as a matter of law. The fact that the Court found that the entrapment defense applied to all three narcotics sales charged in the indictment in that case is no authority for the proposition that once a defendant has been found to have been entrapped that finding bars his conviction for any subsequent participation in the criminal scheme. To the contrary, the *Sherman* Court made clear that proof of an initial inducement does not necessarily bar conviction for subsequent acts and that whether it does in a particular case is a question of fact for the jury (*id.* at 374): "[T]he sales for which petitioner was convicted * * * were not independent acts subsequent to the inducement but part of a course of conduct which was the product of the inducement." Such a rule is entirely consistent with the Court's subsequent observation (*id.* at 377; footnote omitted) that "unless it can be decided as a matter of law, the issue of whether a defendant has been entrapped is for the jury as part of its function of determining the guilt or innocence of the accused." See also *United States* v. *Fields*,

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petitioner admitted committing the offenses charged in the indictment; his only defense was entrapment (Pet. App. 5A, 46A). Moreover, after deliberating for several hours the jury in the first case sent the district court two notes inquiring, in essence, whether, "[i]f there was entrapment as to any one count, does that mean that there was of necessity entrapment as to all of the other counts" (*id.* at 54A). The court gave a supplemental charge to the effect that, although the jury "certainly could find * * * that that which took place * * * prior to March the 13th was so strong that it carried over to the other dates," that result "doesn't follow as a matter of law" (1979 Tr. 7-120; see also Pet. App. 55a). The jury thereafter returned its verdict, acquitting petitioner on counts one and two and convicting him on counts three through seven. In these circumstances, we agree with petitioner that the most likely explanation for the acquittal on counts one and two is the jury's acceptance of his entrapment defense as to those counts. But see Pet. App. 16A-17A.

689 F.2d 122, 125 (7th Cir. 1982), cert. denied, No. 82-807 (Dec. 13, 1982) ("no per se rule which provides that the taint of a first entrapment requires judgments of acquittal as to all subsequent transactions"); *United States* v. *Watson*, 421 F.2d 1357, 1358 (9th Cir. 1970).

2. In the alternative, petitioner may be arguing only that the courts below erred in refusing to find that the facts of this case established, as a matter of law, that petitioner was entrapped with respect to each count of the indictment. The concurrent finding of fact to the contrary by the courts below, however, does not warrant review by this Court. See *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 401 n.2 (1975); *Berenyi* v. *Immigration Director* 385 U.S. 630, 635 (1967).

In any event, that factual determination is amply supported by the record. As the district court observed (Pet. App. 51A), petitioner's "own explanation of his actions after March 13 established beyond any doubt his predisposition to sell drugs on the subsequent occasions." The district court described this evidence as follows (*id.* at 52A):

> [Petitioner] and Daniels [the government informant] were only casual acquaintances. On the other hand, [petitioner] and Newton were close friends. [Petitioner] had been a guest at Newton's apartment on several occasions. After the contact with Officers Harris and Edwards was established, Newton paid [petitioner] — and as [petitioner] said, this money was a factor in his continued involvement. Finally, there was [petitioner's] active role in the sales. He was not a mere conduit or passive passer — [petitioner] made the arrangements, quoted prices, explained quantity discounts, related the number of cuts which the heroin would take, counted the money for Newton, made telephone calls to Newton to set up the actual meeting

> points, and in general, acted for and with Newton in the distributions that were made.
>
> After the first distribution — the sample which [petitioner] obtained from his co-defendant Newton — Daniels had a limited and decreasing relationship with [petitioner]. He had introduced [petitioner] to Edwards and Harris. It was to them that [petitioner] turned and it was to them that he sold. The rewards —money — came from Newton.

In these circumstances, the jury was amply justified in concluding that, even if it entertained a reasonable doubt whether petitioner had been unlawfully induced into the initial conspiracy and distribution, the subsequent sales were the product of his own predisposition.

3. Finally, petitioner's "collateral estoppel" claim (Pet. 15-23) is nothing more than a restatement of his argument that his acquittal on the conspiracy charge and the first substantive count bars his conviction on the remaining five substantive counts. Petitioner thus contends that "all drug sales subsequent to March 13, 1979, were brought about, in totality, because of illegal government activities before and leading up to above date" (Pet. 17) and that "the only issue in this case has been successfully resolved in [petitioner's] favor — i.e. whether he was predisposed to a scheme of illegal distribution of heroin or induced by illegal entrapment into such a course of conduct" (Pet. 23). As we showed above (pages 6-8, *supra*), however, neither as a matter of law nor of fact did petitioner's acquittal on the conspiracy and March 13 substantive counts dispose of the question of his predisposition to commit the offenses charged in the remaining counts of the indictment.[4] Because that issue was

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[4]To the contrary, a fact largely ignored by petitioner is that the first jury *convicted* him on the final five substantive counts, thus necessarily *rejecting* his claim of entrapment as to the offenses charged in those counts.

not "necessarily adjudicated [in petitioner's favor] in the former trial" (*Sealfon* v. *United States*, 332 U.S. 575, 580 (1948)), there was no bar to its adjudication on retrial.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5]Petitioner's contention (Pet. 16-20) that, in view of his prior acquittal on the conspiracy count, the district court erred in permitting the government to introduce evidence concerning " 'the partnership situation' " between petitioner and Newton is specious. As petitioner claims and we acknowledge (note 3, *supra*), the basis for the jury's acquittal of petitioner on the conspiracy charge and first substantive count was its finding that petitioner had been entrapped on those counts. The existence of a conspiracy between petitioner and Newton thus was not "necessarily adjudicated" at the first trial, and the government therefore was free to introduce evidence of the existence of such a combination on retrial. In any event, prior to the second trial the district court ruled (Pet. App. 9A) that "any evidence which pertained solely to the conspiracy or solely to the distribution on March 13 [the first substantive count] could not be received."

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